

NBERZELS

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 11 (PAE)

5 EFREM ZELONY-MINDELL,

6 Settlement

7 Defendant.

-----x

8 New York, N.Y.  
9 November 14, 2023  
10 3:00 p.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the  
17 Southern District of New York

LISA DANIELS

Assistant United States Attorney

18 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

19 BY: JONATHAN MARVINNY

20 Also Present:

21 Matthew Deragon, Special Agent, FBI

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(Case called)

MS. DANIELS: Good afternoon, your Honor. Lisa Daniels for the government, and I'm joined by Special Agent Matthew Deragon.

THE COURT: Good afternoon, Ms. Daniels, and good afternoon, Special Agent Deragon.

MR. MARVINNY: Good afternoon, your Honor. Federal Defenders of New York, by Jonathan Marvinny, for Efrem Zelony-Mindell.

THE COURT: Good afternoon Mr. Marvinny, and good afternoon to you, Mr. Zelony-Mindell. I understand that your client, rather than going by mister goes by Mx. I want to do that, and I will do my very best to do that. Forgive me if I fall into the habit of doing it. Is the correct pronunciation of Mx. "mix"?

MR. MARVINNY: That is correct, your Honor.

THE COURT: That is how your client would prefer I address him?

MR. MARVINNY: That's correct, your Honor. And I have also made mistakes in that regard, and Mx. Zelony-Mindell understands.

THE COURT: And it is Mx. Zelony-Mindell?

MR. MARVINNY: Yes. And thank you for moving things around, and it's very much appreciated by my client and the family of Mx. Zelony-Mindell.

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1 THE COURT: I'm happy to have done that. I am sorry  
2 that the conflicting schedule created uncertainty about whether  
3 it would be attainable, but Mr. Smallman tried to find a way to  
4 make it work. We had a witness who came yesterday, went home  
5 to another state but is coming back tomorrow morning. It  
6 works.

7 MR. MARVINNY: Thanks.

8 THE COURT: We're here to impose the sentence in this  
9 case. By the way, thank you, as well, and welcome to the  
10 members of Mx. Zelony-Mindell's family, friends and those who  
11 are here today. We're here to impose sentence in the case of  
12 *United States v. Efrem Zelony-Mindell*. On July 19, 2023,  
13 Mx. Zelony-Mindell pled guilty to one count of distribution of  
14 child pornography. In preparation of today's proceeding, I  
15 reviewed the plea agreement and the transcript of the plea  
16 proceedings. I've also reviewed the presentence report dated  
17 October 5 including its recommendation and addendum. I have  
18 also received the following additional submissions: First, the  
19 defense's sentencing submission dated October 31, which  
20 attaches various materials, including the psychiatric and  
21 psychosocial report of Dr. Alexander Bardey, a report of  
22 Federal Defender social worker Rachelle Veasley, various  
23 letters in support from family and friends, and certificates  
24 reflecting programs taken and courses taken at the MDC.  
25 Second, I've reviewed the government's sentencing submission

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1 dated November 7.

2 Have the parties received each of these submissions,  
3 and has anything else been submitted in connection with this  
4 sentencing?

5 MS. DANIELS: The government has received the same  
6 materials that the Court mentioned and the government is not  
7 aware of any additional materials.

8 THE COURT: Later on, I'll be asking about things like  
9 forfeiture and restitution. I take it there's not been a  
10 proposed order submitted along those lines?

11 MS. DANIELS: Correct.

12 THE COURT: And same for you, Mr. Marvinny?

13 MR. MARVINNY: Correct.

14 THE COURT: Have you read the presentence report?

15 MR. MARVINNY: Yes.

16 THE COURT: Have you discussed it with your client?

17 MR. MARVINNY: Yes.

18 THE COURT: Mx. Zelony-Mindell, have you read the  
19 presentence report?

20 MR. MARVINNY: I have, your Honor.

21 THE COURT: Have you discussed it with your counsel?

22 MR. MARVINNY: Yes.

23 THE COURT: Have you had the opportunity to go over  
24 with him any errors in the report or anything else that should  
25 be taken up with the Court?

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1 MR. MARVINNY: Yes, your Honor.

2 THE COURT: And Ms. Daniels, have you read the  
3 presentence report?

4 MS. DANIELS: Yes.

5 THE COURT: Putting aside the calculation of the  
6 sentencing guidelines, which we will get to, are there any  
7 concerns about the report regarding its factual accuracy?

8 MS. DANIELS: None from the government.

9 MR. MARVINNY: Not from us, your Honor.

10 THE COURT: Okay. Hearing no objections, I will adopt  
11 the factual recitations in presentence report. The report will  
12 be made a part of the record in this matter. It will be placed  
13 under seal. In the event an appeal is taken, counsel, on  
14 appeal, may have access to the sealed report without further  
15 application to the Court. Ordinarily, at this point, I ask  
16 whether there's any reason why the parties' sentencing  
17 submissions should not be publicly filed. I think the better  
18 way to formulate that here is there's clearly good reason,  
19 sounding in medical and psychiatric confidentiality, for  
20 portions of this reports to be redacted, but subject to  
21 justified redactions, is there any reason that they shouldn't  
22 be publicly filed?

23 MS. DANIELS: None that the government is aware of.

24 THE COURT: And has yours been filed?

25 MS. DANIELS: Yes.

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1 THE COURT: I thought so. Okay. The same?

2 MR. MARVINNY: No reason, your Honor. We have  
3 publicly filed a modestly redacted version.

4 THE COURT: Very good. All right. Turning to the  
5 sentencing guidelines, the Court is no longer required to  
6 follow the sentencing guidelines, but I am required to consider  
7 the applicable guidelines in imposing sentence. To do so, it's  
8 necessary that the Court accurately calculate the guidelines  
9 sentencing range. In this case, there was a plea agreement in  
10 which the parties stipulated to a particular calculation of the  
11 sentencing guidelines.

12 Counsel, am I correct that the calculation in the  
13 presentence report is in accord with your agreement?

14 MS. DANIELS: Yes.

15 MR. MARVINNY: Yes.

16 THE COURT: All right. Then based on the parties'  
17 agreement, the absence of objection, and my independent  
18 evaluation of the guidelines, I accept the guideline  
19 calculation in the presentence report. I find, therefore, that  
20 the offense level is 37, the criminal history category is I,  
21 and the guideline range is between 210- and 262-months'  
22 imprisonment. I also find that there's a mandatory minimum  
23 sentence, that I can't impose a sentence below, of 60-months'  
24 imprisonment.

25 The next subject I need to cover is departures, which

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1 is to say that in the framework of the sentencing guidelines in  
2 the plea agreement, both parties agree that neither an upward  
3 nor downward departure, that is to say within the guidelines  
4 framework, is merited. Having reviewed the presentence report  
5 and the parties' submission, I share the conclusion. I find  
6 that no departure is available as a matter of law. Of course,  
7 that does not preclude any party from seeking a variance from  
8 the guideline range, and both parties in this case are seeking  
9 a downward variance.

10 Having taken care of those necessary preliminaries,  
11 does the government wish to be heard with respect to  
12 sentencing?

13 MS. DANIELS: Yes, your Honor. This is a very serious  
14 case, and the government has thought hard and carefully about  
15 the appropriate sentence to recommend here. The government has  
16 concluded that a sentence of 120-months, both a significant  
17 sentence and a significantly-below-guideline sentence, is  
18 necessary here to account for the offense conduct, to promote  
19 respect for the law and, crucially, to protect the public. The  
20 offense conduct here was particularly heinous and dangerous to  
21 society's most vulnerable individuals, children. The offense  
22 conduct involved both the possession and distribution of child  
23 pornography as well as the attempted enticement of a purported  
24 nine-year-old child to engage in sexual activity.

25 First, beginning with the distribution and possession

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1 of child pornography here, this conduct was significant, and it  
2 was initiated by the defendant with respect to the activity and  
3 the communications with the undercover. The defendant first  
4 reached out to the first undercover agent on a messaging  
5 application called --

6 THE COURT: Just help me understand. Essentially, I  
7 appreciate there's no defense offered in this case of anything  
8 like entrapment, but I was having difficulty understanding just  
9 how the engagement got started. What was it that was publicly  
10 posted that I gather the defendant alerted to or responded to?

11 MS. DANIELS: I understand that the defendant reached  
12 out to an undercover agent with an account on a messaging  
13 application called SCRUFF, and I understand that that  
14 application is used, I believe, primarily in a dating context;  
15 is that correct?

16 MR. DERAGON: Correct.

17 MS. DANIELS: With respect to men seeking  
18 relationships with other men.

19 THE COURT: As opposed to men seeking relationships  
20 with children?

21 MS. DANIELS: Correct.

22 THE COURT: And what was the outward-facing presence  
23 of the undercover, if you will? What was that  
24 advertising/seeking?

25 MS. DANIELS: I understand that the profile indicated



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1 that the undercover was interested in taboo; taboo being a  
2 shorthand or euphemism for activity with children, with minors.

3 THE COURT: So in other words, the undercover puts  
4 that out, and then Mx. Zelony-Mindell sees it and reaches out?

5 MS. DANIELS: Yes. The defendant, as I understand,  
6 reached out to that account with that interest stated in taboo  
7 and asked if the undercover was interested in taboo. Once  
8 learning from the undercover that the undercover purportedly  
9 was interested in taboo, the defendant then asked the  
10 undercover if he had a Telegram account, an encrypted account,  
11 and suggested they move to Telegram. Once communicating on  
12 Telegram, the defendant quickly began exchanging child  
13 pornography with that undercover. It was within days, and  
14 within days, the defendant even sent child pornography showing  
15 an image of a toddler, an approximately four-year-old child,  
16 being forced to perform oral sex on an adult male. These  
17 images included other horrifying images. Images, for instance,  
18 of an approximately 11-year-old child being penetrated anally.  
19 In total, there were over approximately 2,900 images.

20 THE COURT: And these are all going in the direction  
21 of Mx. Zelony-Mindell to the undercover?

22 MS. DANIELS: Yes. With respect to the total number,  
23 the 2,900 that I just mentioned, I want to make a clarification  
24 to the government's sentencing submission in which the  
25 government cited a portion of the defense submission stating

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1 that the total number of images was approximately 2,000 or over  
2 2,000. Now, importantly, that number is the total; whereas,  
3 the number of unique images is 1,500, still an extremely  
4 significant amount of child pornography. And also, very, very  
5 troubling is that 50 of those 1,500 unique images showed images  
6 of toddlers, infants and BDSM. The damage done to these  
7 children --

8 THE COURT: Pause for a moment on that. I understand  
9 it's undisputed that Mx. Zelony-Mindell did not himself  
10 generate these images. Is there any understanding where he got  
11 them?

12 MS. DANIELS: I recall from chats, in which the  
13 defendant was participating with the undercover agents, that in  
14 response to, I believe, questions from the undercover, the  
15 defendant responded that he used to visit and participate in  
16 chat rooms and had collected a trove -- my words not the  
17 defendant's words -- a trove of child pornography. I believe  
18 the defendant's words were that he had a "shit ton" on his  
19 phone.

20 THE COURT: Thank you.

21 MS. DANIELS: The harm done to these children is  
22 significant. It is concrete. It is real lives. It is done in  
23 the making of the imagery, and it is also done, and that harm  
24 is perpetuated, during the sharing of this imagery. These  
25 victims live their entire lives knowing that their worst

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1 moments are being relived, and not only that, but that  
2 individuals, such as the defendant, are experiencing and  
3 gaining pleasure from the worst moments of their lives, truly  
4 living nightmares.

5 That alone, that conduct, requires a significant  
6 sentence and one well above the mandatory minimum here, in  
7 particular, to promote general deterrence with respect to the  
8 law here to account for this serious, serious offense. The  
9 defendant's conduct did not stop with the distribution of child  
10 pornography. It extended also to have hands-on contact with  
11 what he thought -- they thought, rather -- was an actual child.  
12 The first undercover agent that I've mentioned relayed to the  
13 defendant that the undercover had a friend with a nine-year-old  
14 child and sent the defendant the contact information, the  
15 Telegram information, for that other second undercover.

16 The defendant then contacted the second undercover  
17 within minutes on Telegram. They began communicating, and very  
18 quickly, the defendant expressed a desire to meet and engage  
19 with sexual activity with a nine-year-old. During those  
20 conversations, the undercover stated to the defendant that the  
21 nine-year-old boy/child would be knocked out a little bit of  
22 sleep medication to which the defendant responded, "Yeah  
23 totally." Shortly thereafter in approximately the month of  
24 June, 2022, the defendant moved to Arkansas, but he kept  
25 talking to the undercover.

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1 THE COURT: Where had the defendant been originally?

2 MS. DANIELS: The defendant was originally in New York  
3 and then moved to Arkansas. The defendant understood that the  
4 undercover with the purported nine-year-old child lived in New  
5 York and continued those conversations about meeting and  
6 engaging with sexual activity with that nine-year-old. Those  
7 conversations continued for months. On October 3 of 2022 the  
8 defendant, in a conversation with the undercover, stated that  
9 he was looking at the week of December 13 to 15 to come to New  
10 York, and they continued to discuss how that might be a time  
11 for the defendant to engage in a sexual activity with a  
12 nine-year-old child. This is months in advance. The defendant  
13 had months. He had plenty of time to think about his planned  
14 actions here, to think about the harm that he was intending for  
15 this nine-year-old child, and then he followed through on it.

16 And then, he traveled to New York, and rather than  
17 traveling to New York for his own purposes, I understand there  
18 were medical appointments, he included in his plans and  
19 purposefully made sure that this meeting would occur. Indeed,  
20 the day before, he messaged the undercover and stated, "I can't  
21 wait to taste his sexy little nine-year-old penis."

22 On December 16, when the defendant showed up with the  
23 arranged meeting where he thought he was going to meet the  
24 undercover and then proceed to have sex with the nine-year-old  
25 child, he was arrested, and, thankfully, no harm fell to any

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1 actual child. But that is no credit to the defendant. The  
2 defendant's actions make clear that he intended to engage in  
3 sexual activity with a nine-year-old child; that he had planned  
4 it for months and was looking forward to it.

5 This crime warrants an extremely serious punishment,  
6 and, again, one well above the mandatory minimum sentence here.  
7 The government recognizes that the defendant has accepted  
8 responsibility, that the defendant has shown remorse, and that  
9 the defendant has shown a willingness to cooperate, but none of  
10 that detracts from the seriousness of the offense conduct here,  
11 and the need for general deterrence, and for the Court to  
12 communicate the very real harm to the most powerless,  
13 vulnerable individuals in society is extremely serious and  
14 warrants a serious sentence here, which is a significant part  
15 of the government's recommendation for a sentence of  
16 120-months.

17 The need to protect the public also requires a very  
18 significant sentence well above the mandatory minimum. The  
19 government, again, recognizes that the defendant has expressed  
20 a desire to change, to seek help, and to participate in that  
21 treatment. And the government's sincere hope is that that  
22 occurs, but that does not fully allay the concerns about the  
23 danger to the community. There are serious concerns that  
24 remain.

25 This individual has been diagnosed with pedophilia.

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1 But putting aside that diagnosis, as there are issues in the  
2 expert report, which the government has highlighted in its  
3 sentencing submission. The defendant's own demonstrated  
4 conduct shows a sexual interest in children as well as a  
5 willingness to act on it. And, again, these are issues that  
6 the forensic reports from the defense expert did not address.  
7 In addition to the conversations that I've highlighted so far,  
8 I think one particular segment of conversation between the  
9 defendant and the undercover is important here underscoring the  
10 danger posed by this diagnosis of pedophilia as well as the  
11 demonstrated interest in children and not only children but  
12 toddlers -- but prepubescent children.

13 In one conversation, a text message conversation, this  
14 is USAO 0000504, which has been produced to the defense. The  
15 defendant, using the handle Evan, writes to the undercover,  
16 "What is the youngest you'd fuck?" The undercover responds,  
17 "Hmmmm, honestly, Bro, maybe two, if I could. What about you?"  
18 The defendant responds, "Absolutely the same, dude. My huge  
19 cock in that perfect little body making him take all of it."  
20 The undercover responded, "Slow or hard?" The defendant  
21 responded, "I definitely want him to cry." The defendant  
22 responded again, "Honestly, I think we both know we would go  
23 hard and raw." The undercover responded, "Fuck yes." The  
24 defendant responded, "There's no point fucking a little boy  
25 with a condom." This is talking about sexual activity, rape,

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1 of a two-year-old. This conduct, these statements, this  
2 demonstrated interest shows that notwithstanding any expert  
3 report or any showing of remorse and acceptance of  
4 responsibility, there are concerns that remain with respect to  
5 protection of the public. Again, it's society's most  
6 vulnerable that need this protection, a very serious sentence  
7 is warranted in order to do that and to achieve that goal of  
8 sentencing.

9 Before I conclude, I want to address a few points with  
10 respect to avoiding disparities with respect to other sentences  
11 in this district as well as how that might relate to criticisms  
12 of the applicable guidelines here, of which I'm aware of the  
13 Court's views. For the reasons already stated in the  
14 government's sentencing submission, the cases highlighted by  
15 the defense in support of their recommended sentence of a  
16 mandatory minimum sentence of five years ignore certain  
17 distinguishing factors and circumstances. Each sentence is a  
18 unique sentence. Each defendant is a unique defendant. But  
19 here, those selected and pointed to by the defense ignore a  
20 number of factors including the absence of diagnoses of  
21 pedophilia, the age of certain of the defendants, the absence  
22 of intended victims who were prepubescent minors, the absence  
23 of a huge collection of child pornography including images of  
24 infants and toddlers, certain mental health and other  
25 illnesses, different in kind from those present here, and in

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1 certain cases, conduct that involved possession or distribution  
2 of child pornography, but the absence of any attempted  
3 enticements, any attempted, actual hands-on contact.

4 The defendant's submission also ignored several cases  
5 where a body of cases in this district as well as the Eastern  
6 District of New York, which shows that indeed there's a wide  
7 range and there's a spectrum of which the government's  
8 recommendation of 120-months is well within. For example, in  
9 attempted enticement cases, sentences range from under ten  
10 years to over 20 years with ten years on balance for certain  
11 cases that are similar and, again, similar on balance rather  
12 than similar as an exact match, as I noted that all defendants  
13 are unique and each case is different.

14 I would point, first, to *United States v. Jose Perez*,  
15 which was before your Honor 19-Cr.-297. Here the defendant  
16 pleaded guilty to attempted receipt of child pornography as  
17 well as bail jumping. There was a mandatory minimum of five  
18 years there, and I believe the guidelines were starting at 192  
19 months. The sentences imposed there, 120 months with 96 months  
20 specific to the attempted receipt of child pornography. There  
21 the relevant conduct included that the defendant messaged with  
22 an undercover he thought was a twelve-year-old girl, tried to  
23 get him to create and send him pornography of herself, child  
24 pornography, and then the defendant showed up at a restaurant  
25 to meet her and was arrested there. There were certain



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1 mitigating factor there, including that the defendant was 64  
2 years old, had COPD, and other serious health conditions, and  
3 there was an expert report finding that he was not, in fact, a  
4 pedophile. There were also certain aggravating factors. The  
5 criminal history, including decades-old convictions but  
6 significant convictions for narcotics and robbery, including  
7 significant sentences attached to those convictions, as well as  
8 the bail jumping that occurred in that case. There were  
9 certain distinctions, of course, from this case, the absence of  
10 any huge trove of child pornography, but on balance, I think  
11 this is a sentence that I think is indicative of sentences  
12 imposed in this district that show that, when balancing all the  
13 factors at play, a sentence of 120 months is important and  
14 warranted and well within the sentences imposed in this  
15 district.

16 Another sentence is *U.S. v. Peter Bright*, 19-Cr.-521  
17 before Judge Cronan. Excuse me, Judge Castel. Thank you.  
18 Here the defendant was convicted at trial of attempted  
19 enticement and sentenced to 144-months' imprisonment where  
20 there was a ten-year mandatory minimum. Here, the defendant  
21 communicated with an undercover about meeting her purported  
22 seven- and nine-year-old children to engage in sexual activity  
23 and showed up to that meeting. In that case, there was no  
24 possession of child pornography at issue or distribution.  
25 There was an expert report that found that there was no hint of

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1 pedophilic or deviant sexual behavior. There was a counselor  
2 who agreed with that diagnosis, and there was also a lifelong  
3 history of severe depression in this that case. Again, this is  
4 another case where the factors on balance align with the  
5 factors on balance here.

6 There are several other examples throughout the SDNY  
7 and the EDNY showing that possession, receipt, transportation  
8 of child pornography cases typically receive or may receive  
9 between five and seven years. For example, *United States v.*  
10 *Francis Hughes*, 21-Cr.-584, before Judge Halpern here in the  
11 Southern District; *U.S. v. John Cruz*, 15-Cr.-338, again, before  
12 Judge Castel; *U.S. v. Michael Wustrow*, 17-Cr.-87 in the Eastern  
13 District before Judge Hurley; and *U.S. v. Zanco*, 18-Cr.-412  
14 before Judge Bianco, also in the Eastern District.

15 Another category of offenses shows that recent  
16 offenders for purely possession of child pornography, or  
17 distribution, lands closer to ten years. Here as an example,  
18 *U.S. v. Lancelot Lutchman*, 18-Cr.-654, before Judge Crotty.  
19 And then there's a category of cases where there's attempted  
20 enticement or child pornography, possession/distribution, where  
21 the offenders are repeat offenders, and those sentences are  
22 nearly double what the government is seeking here. Those range  
23 up to 20-plus years' imprisonment, including *U.S. v. Michael*  
24 *Irizarry*, 18-Cr.-05, before Judge Caproni, where a sentence was  
25 imposed of 20-years' imprisonment for a similar offense of

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1 attempted enticement where the defendant had been previously  
2 convicted of possession of child pornography.

3 As I mentioned, each defendant is different. Each  
4 sentence is different, but taking a look at the body of  
5 sentences for conduct that is similar and related to the  
6 conduct at issue here as well as considering each of the  
7 sentencing factors, the offense conduct, the seriousness of it,  
8 the need for protection of the public as well as the mitigating  
9 factors as outlined in the defense submission, the government  
10 submits that's a sentence of 120 months is appropriate here.

11 THE COURT: Thank you. Thank you, I should add, for a  
12 superb sentencing submission and for a very thoughtful  
13 presentation today. I would just say that the recounting of  
14 prior precedence is a valuable thing. As a general  
15 proposition, it's something that the defense tends to do a lot  
16 more of and better of than the government, and I think, just as  
17 a matter of helpful advocacy, in a case with troubling and  
18 unusual facts, that exercise is valuable to the Court, so thank  
19 you.

20 A couple of questions for you. First, just some  
21 housekeeping ones. Is the government in agreement with the  
22 probation department that the only special assessment that  
23 should apply here is the \$100 that the other higher ones don't  
24 apply because the defendant is indigent?

25 MS. DANIELS: Correct. The other special assessments

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1 do apply; they are mandatory but for a finding of indigency.

2 THE COURT: That's what I was trying to capture. I  
3 was struck by the absence of any victim impact statements. And  
4 very often in child pornography cases, the F.B.I. is able to  
5 identify, at least for some of the images, who they trace back  
6 to, whether it's the actual victim or a parent. I take it none  
7 of that happened here?

8 MS. DANIELS: We're still in the process of that. I  
9 understand that the database and the unit that runs those  
10 searches is quite backed up. Step one of that process has  
11 completed of identifying a series of images that are  
12 identifiable and for which the government has information.  
13 I'll defer to Special Agent Dergaon if any of that is  
14 incorrect. I believe step two is identifying specific victims  
15 and through that process, their contact information. Any  
16 submissions with respect to victim impact and restitution  
17 related is still ongoing.

18 THE COURT: Okay. I mean, the first point of asking  
19 was really if there was going to be a perspective of a victim  
20 offered. And while I've had a number of cases involving child  
21 pornography and can fairly extrapolate from the types of  
22 statements that parents and children give in those cases, I  
23 take it here, just because of the back-up, in practice, we just  
24 don't have that here.

25 MS. DANIELS: That's correct.

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1 THE COURT: Okay. As for restitution, I understand  
2 you are seeking a 90-day delay, and I think I get it, the idea  
3 is essentially, because of back-up, it's as yet unknown whether  
4 within 90 days, you'll be able to identify a victim let alone  
5 work up what the restitution analysis is.

6 MS. DANIELS: Yes.

7 THE COURT: So how long are you seeking then to make a  
8 restitution submission? That would be mid-February?

9 MS. DANIELS: Yes, I believe the 90 days -- I can  
10 calculate it.

11 THE COURT: All right. I'll ask Mr. Smallman to come  
12 up with 90 days, but that's helpful. Next question involves  
13 the guidelines. As to the child pornography guideline, it's  
14 not me, it's the Second Circuit in *Dorvee*, which has thrown  
15 that guideline under the bus and has basically said it's a  
16 political construct that essentially reflexively yields a very,  
17 very high number beyond that which might be justified in the  
18 individual case. The government here could have, I take it,  
19 insisted, as a condition of the plea -- whether it would have  
20 been accepted or not is another story -- to plead to the  
21 enticement count.

22 MS. DANIELS: Right.

23 THE COURT: Had the enticement count been the subject  
24 of the plea, what would the mandatory minimum have been?

25 MS. DANIELS: Had the enticement been the only count?

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1 THE COURT: Correct.

2 MS. DANIELS: Then it would have been a ten-year  
3 minimum.

4 THE COURT: What was the reason for accepting a plea  
5 to the child pornography as opposed to insisting the enticement  
6 count?

7 MS. DANIELS: The government reviewed the defense  
8 mitigation submission detailing many of the mitigating factors,  
9 or all of the mitigating factors, that are now before the Court  
10 in this sentencing as well. There are significant mitigating  
11 factors. Though, again, they are balanced against extremely  
12 significant conduct and a need for serious protection of the  
13 public that is ongoing. As the government is seeking a  
14 sentence of -- the government made a determination, at the time  
15 that that mitigation package was submitted, in light of that  
16 presentation, that a plea to the distribution charge was  
17 appropriate and was a resolution that the government would  
18 accept. With respect to currently --

19 THE COURT: In other words, that the defense should  
20 have the opportunity to seek a below ten-year sentence even  
21 though the government's advocacy would stop at ten years?

22 MS. DANIELS: Correct.

23 THE COURT: Okay. I tried to figure out what the  
24 guideline would be if one discounted for the *Dorvee* problem.  
25 And as I understand it, under the plea agreement, both parties

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1 agree that given the admission to the child enticement as  
2 relevant conduct, you have two separate groups. And because  
3 the child enticement guideline group is higher but the two  
4 yield relatively close offense levels, you add two levels to  
5 the child enticement group. If one operates on the assumption  
6 that the child pornography group's offense level is unusually  
7 high for the problem spotlighted in *Dorvee*, and just assume for  
8 argument's sake that the group that was formulated by the child  
9 pornography guideline would be more than nine levels less than  
10 the enticement guideline; in effect, the overall offense level  
11 in this case drops by two. Because we added to --

12 MS. DANIELS: Yes.

13 THE COURT: Under the grouping rules you subtracted  
14 two if you assume away the child pornography group.

15 MS. DANIELS: Yes, I believe that's correct.

16 THE COURT: So by my calculation, the guideline range  
17 here would have been 168 to 210 months to correct maximally for  
18 the *Dorvee* problem. You can check my math, but I'm respectful  
19 of the *Dorvee* critique. But in this case, because the  
20 guideline that predominantly drives the analysis is not subject  
21 to that critique, the enticement guideline, it looks to me as  
22 if the *Dorvee* correction gets you no lower of 168 to 210. That  
23 doesn't necessarily mean it is the measure of the just  
24 sentence, but it eliminates the *Dorvee* critique; is that a fair  
25 way of looking at the guideline dimension of this problem?

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1 MS. DANIELS: I believe that's correct. I haven't  
2 independently calculated the guidelines in that way, but from  
3 the Court's description, I believe that is correct and agree  
4 that, as a substantive matter, there are distinctions from  
5 *Dorvee*, as your Honor has mentioned, with respect to the  
6 attempted enticement here.

7 THE COURT: I confess, I didn't do a systematic  
8 search, but I'm aware of case law that critiques the enticement  
9 guideline in the way that the *Dorvee* decision very memorably  
10 critiques the child pornography guideline.

11 MS. DANIELS: Yes, I'm not aware either.

12 THE COURT: Thank you. Again, thank you for a superb  
13 sentencing submission both today and in writing.

14 Okay. Mr. Marvinny, I'm happy to hear from you.

15 MR. MARVINNY: Thank you, your Honor. There's a lot  
16 to respond to with what the government said, but I maybe want  
17 to start with one of the guideline questions that the Court  
18 raised. I agree, there's not case law directly criticizing the  
19 enticement guideline, which is 2G1.3, to the same extent that  
20 *Dorvee* criticized the child pornography guideline. We did  
21 attempt in our submission to deconstruct 2G1.3 a bit. I do you  
22 believe that it suffers from some of the very same problems  
23 that the child pornography guideline suffers from identified in  
24 *Dorvee*; namely, the guidelines base offense level has been  
25 ratcheted upward over the years solely to reflect increasing



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1 mandatory minimums imposed on enticement offenses. Enticement  
2 offenses went from a zero to a five-year to a ten-year  
3 mandatory minimum, and at each iteration, the guideline 2G1.3  
4 similarly raised its base offense level just to reflect those  
5 changes. And that was one of the key criticisms of the child  
6 pornography guideline in *Dorvee*.

7 THE COURT: With respect, and I don't want to get into  
8 a lot of guideline analysis, because the case ought to be  
9 decided on other factors, but *Dorvee* has a range of other  
10 problems. The defendant could commit the distribution offense  
11 in *Dorvee* through conduct that is little more than accessing  
12 oneself but in a way that, sort of, by the way computers work,  
13 tends to replicate copies of child pornography, and then when  
14 that happens, in effect every upward enhancement is  
15 automatically triggered. Here, the notion is the base offense  
16 level is very high, but it appears based on a normative  
17 judgment by Congress, but one that is hard to disagree with,  
18 which is that the conduct of enticement by its nature deserves  
19 a very high base offense level. It doesn't feel to me as if  
20 the *Dorvee* critique, which is just a jerry-rigged guideline  
21 that creates a lot of artificial upward enhancements that  
22 automatically kick in, is a natural fit here.

23 MR. MARVINNY: Right. That is one -- maybe a  
24 secondary or a coequal criticism in *Dorvee* of the guideline.  
25 But, again, the point of the sentencing commission, kind of,

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1 not exercising its characteristic institutional role in  
2 determining a just sentence and simply reflecting a directive  
3 from Congress, that's equally true of 2G1.3, and that's a  
4 criticism in *Kimbrough* for the crack cocaine guidelines, in  
5 *Dorvee* for the child pornography guidelines --

6 THE COURT: Okay. Let me get to the substance. If  
7 the notion that the decider was more Congress than the  
8 sentencing commission, I suppose the critical question is:  
9 What is wrong with Congress' more or less categorical judgment  
10 that crimes of this nature belong at a very high level?

11 MR. MARVINNY: That's obviously a very fair question.  
12 I don't know that I have the answer to that question. There's  
13 a larger critique of mandatory minimum sentences writ large.

14 THE COURT: That I get, yes. That's a different  
15 issue.

16 MR. MARVINNY: This would certainly fall into it.  
17 Again, if we're trying to use a guideline as a mechanism for  
18 arriving at a just sentence, what the Second Circuit and the  
19 Supreme Court said is if the sentencing commission didn't  
20 determine that the sentence is based on national data, past  
21 practices, comparison of similar cases, then the guideline is  
22 just a poor mechanism. It may not be incorrect at the bottom,  
23 and the Court may agree with Congress' mandatory minimums in  
24 the particular offense, but the guideline itself lacks as much  
25 validity as one that the sentencing commission has arrived at

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1 from empirical data.

2 THE COURT: Point taken. Thank you.

3 MR. MARVINNY: But you are right, your Honor. The  
4 guidelines are just one factor in this case like any other  
5 case. What I wanted to emphasize to the Court, much more  
6 important than the guidelines analysis, is that no one disputes  
7 the gravity of the offense here, the seriousness of it, the  
8 moral repugnancy of the offense, no one including Efrem  
9 Zelony-Mindell. I'll speak more about that in a moment, but we  
10 acknowledged that at the outset, and we would be remiss not to  
11 acknowledge the conduct is disturbing. I think our submission  
12 adequately conveys that. I think Mx. Zelony-Mindell 's letter  
13 accurately conveys, and I think Dr. Bardey's report adequately  
14 takes account of that fact, and I will speak more about that as  
15 well.

16 But I do want to start, your Honor, with the fact that  
17 Mx. Zelony-Mindell truly does display a remarkable degree of  
18 insight, remorse and acceptance of responsibility. For better  
19 or worse, it is not every defendant accused of these crimes  
20 that does so and certainly not to the extent that  
21 Mx. Zelony-Mindell has. And, your Honor, this isn't just  
22 something convenient for our sentencing submission that we want  
23 to be able to stand up here and say this to the Court at the  
24 last minute. This was true from the moment that they were  
25 arrested. The government acknowledges this. Agent Deragon,

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1 who was one of the interrogators of Mx. Zelony-Mindell, is in  
2 court today. From the moment of their arrest, they were  
3 ashamed, remorseful. They said, both during their interview  
4 and to Dr. Bardey, that in some sense they expected that they  
5 would be arrested and that that was the appropriate thing  
6 because what they had done was so shameful. They immediately  
7 cooperated with law enforcement. They volunteered, your Honor,  
8 that they had a second cell phone back at an apartment in  
9 Brooklyn where they had been staying, and that cell phone  
10 contained the vast majority of child pornography here. So when  
11 the government talks about the 1,500 unique images, which we  
12 don't dispute in my way, a large number of that was on the  
13 second phone that was volunteered by Mx. Zelony-Mindell. They  
14 also volunteered their passcodes and gave the agents permission  
15 to go through their phones and assume their social media  
16 accounts. That was from essentially minute one after their  
17 arrest.

18 THE COURT: Prior to defense counsel being appointed?

19 MR. MARVINNY: Absolutely correct, your Honor, prior  
20 to defense counsel getting involved. It's continued through.  
21 Mx. Zelony-Mindell 's father is here. I know he has had  
22 extensive conversations with Efrem, our social worker has, I  
23 have. The level of remorse palpitates off of Efrem. It's  
24 tangible when you are in the room with them. I don't think  
25 that should be overlooked. In terms of are they going to

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1 reoffend? Are they a danger? That is a significant factor  
2 that is just not present in every case. The government  
3 identified --

4 THE COURT: Pause on that for a moment. I appreciate  
5 that Dr. Bardey finds a limited risk of recidivism, not zero  
6 but low. I hope that's true. How reliable is that? I mean,  
7 we do have, in this case, a defendant whose conduct brings him  
8 literally to the brink of sexual conduct with a nine-year-old.  
9 Why is it safe to assume that with the intervention of  
10 Dr. Bardey, with the fact of the arrest, why is it safe to  
11 assume that if at liberty again and with access to electronics  
12 again, something like this wouldn't happen again or couldn't  
13 happen again?

14 MR. MARVINNY: I certainly can't say it couldn't  
15 happen again, and I can't even say it wouldn't with 100 percent  
16 certainty. But I think why the Court could have reasonable  
17 assurance is Dr. Bardey did find, in part -- well, for a couple  
18 reasons. One, Mx. Zelony-Mindell had no prior criminal  
19 history, certainly, and no prior actual real world sexual  
20 contact, sexual activity, with a minor or with a child. And  
21 they are in the mid-30s now, and this is a very first offense.  
22 Dr. Bardey found that significant.

23 Second, as Dr. Bardey says, Efrem exhibits no  
24 psychopathic features, no antisocial behavioral tendencies.  
25 They are, in many ways, although they have a history of mental

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1 illness that factor into the offense, a relatively  
2 well-adjusted person.

3 Third, the pedophilic disorder, which the government  
4 makes a lot of that was found by Dr. Bardey, was based  
5 primarily on the offense conduct. The testing, the Abel  
6 testing and the other objective tests at issue, determined that  
7 Efrem, primarily sexually attracted to adults, has a secondary  
8 interest in 14 to 17 year olds. And so when Dr. Bardey found  
9 that Efrem has pedophilic disorder, it was of a non-exclusive  
10 type, which sets them apart from other people with that  
11 disorder; meaning that, in fact, the primary interest sexually  
12 is in adults. And that's reflected, again, in the fact that  
13 there's been no contact offense prior to this, that Efrem has  
14 had relationships with only age-appropriate men throughout --

15 THE COURT: What do you make, though, of the  
16 communications that AUSA Daniels summarized which seemed to  
17 describe somewhat durably an interest in much, much younger  
18 children?

19 MR. MARVINNY: First of all, I don't belittle anything  
20 that was said. It's difficult to listen to. I think in every  
21 comparison case that we've been talking about, I think the  
22 government could go through and these chats are exceptionally  
23 salacious. Efrem participated in something that is known as  
24 age play. We haven't made a ton of it, but it was evident  
25 throughout their chats with the undercover. It's reflected in

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1 Dr. Bardey's report, and it's a well-recognized activity. And  
2 what that is is two grownups talking to each other about sexual  
3 activity with minors or with children in a way that arouses  
4 them. It doesn't necessarily mean there's going to be any  
5 contact offense, and age play is something that Efrem --

6 THE COURT: And I get that that is a thing. The  
7 problem is he shows up with lubricant to a meeting with a  
8 nine-year-old. And so, that is a telling fact that suggests  
9 we're well past playacting.

10 MR. MARVINNY: Yes, your Honor, for sure. No, we've  
11 acknowledged that that conduct is there. That conduct is there  
12 in every one of the cases I've cited as well. And I'll talk  
13 more about those cases in a minute. The government wants to  
14 say they are not really opposite. They are.

15 But that conduct is concerning, and it merits the  
16 five-year sentence. It merits incapacitation. But the  
17 question is how much incapacitation? How much punishment is  
18 enough? And, again, Dr. Bardey, acknowledging that conduct,  
19 made certain diagnoses but also said that Efrem presents a low  
20 risk of violence, danger and recidivism and is amenable to  
21 treatment, and there is treatment available.

22 Getting back to my original point of the kind of  
23 uncommon sense of responsibility and remorse, Efrem is  
24 literally dying participate in this treatment to a degree that  
25 is really commendable. As the Court knows, in our submission,

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1 we've asked that Efrem be designated to what is called a SOMP,  
2 S-O-M-P, which is a Sex Offender Management Program in the  
3 Bureau of Prisons. This would be a program that is essentially  
4 dedicated to people with similar charges to Efrem and for  
5 people who want to do the work to make themselves better. And  
6 Efrem is anxious to participate --

7 THE COURT: You are recommending Petersburg?

8 MR. MARVINNY: We are asking the Court to recommend a  
9 designation to Petersburg.

10 THE COURT: During my second month on the job, when  
11 they take new judges to a federal prison, that happened to be  
12 where my group of new judges for training was taken to, and I  
13 was impressed by significant aspects of the facility.

14 MR. MARVINNY: I appreciate that, your Honor. Because  
15 we have thought long and hard about the recommendation in this  
16 case. And to Efrem's credit, they want the treatment. And  
17 this is also reflected in work they've done with Ms. Veasley,  
18 who is the director of our social work program, they've met  
19 over 30 times. She's on maternity level, but if she were here,  
20 she would tell of the level of commitment to getting better  
21 Efrem has. It is genuine. That's all I can say. I hope you  
22 saw it Efrem's letter to you, and you'll hear it today when  
23 Efrem is given a chance to speak.

24 So all of those things, just to recap very briefly,  
25 the lack of psychopathic features, the lack of prior criminal



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1 history, the lack of any real world sexual conduct with a  
2 minor, the cooperation with law enforcement, the amenability  
3 and desire for treatment, and why I think the Court can take  
4 some solace in Dr. Bardey's claim that Efrem has a low risk of  
5 recidivism. It's certainly worth taking a chance and giving a  
6 sentence of five years with some period of supervised release,  
7 which is, of course, mandatory and which the Court can  
8 determine the appropriate length and allow Efrem to do  
9 treatment work both inside and outside of prison walls.

10 Your Honor, again, there was a lot in what the  
11 government said. I do want to talk about the comparison cases  
12 that we've cited in the submission. Of course, any case is  
13 distinguishable from any other. There are no two cases that  
14 are identical in any respect, but the seven cases that we've  
15 cited are absolutely the closest that we could find to the  
16 situation at issue here. They are as close to as on all fours  
17 as possible. There are distinctions between them, of course,  
18 but in the aggregate, they represent the constellation of  
19 factors that is present here. Defendant is caught in a sting.  
20 They are permitted to plead down to the lesser offense than the  
21 enticement offense. Defendants who by and large possessed  
22 child pornography, not everyone of them did -- Ms. Daniels  
23 is right, the vast majority of them did -- and who were given  
24 sentences well below the guidelines range. We've talked a lot  
25 about the guidelines. I mentioned this in our submission.

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1 Efrem's guidelines are only higher than those defendants, and  
2 marginally so, they are only higher because the government  
3 insisted, as is their right, that Efrem agreed that the  
4 enticement guideline and enticement offense qualify as relevant  
5 conduct under the guidelines. That has the impact of actually  
6 elevating their offense level.

7 THE COURT: But it also has the -- the plea agreement  
8 also had the effect of giving you the opportunity to make the  
9 argument you are making here today. Had the government said,  
10 all right, we'll choose the enticement rather than child  
11 pornography guideline, you would be here with a mandatory  
12 minimum floor of ten years. It's hard to critique what the  
13 government has done is, in some sense, a decision that  
14 heightens your client's exposure. It was, by another light, a  
15 Solomonic way of giving you the opportunity to make this  
16 argument while making sure that your client, not only from a  
17 factual perspective but from a guidelines perspective at least,  
18 was accountable for both categories of conduct.

19 MR. MARVINNY: Agreed, your Honor. We were thankful  
20 for the plea offer. I'm not faulting the government at all.  
21 I'm simply saying that, in looking at those comparison cases,  
22 those defendants, despite having engaged in the same conduct,  
23 did not have to accept that guideline. As Ms. Daniels, I'm  
24 sure, will confirm, because we had the conversation with her  
25 office, this is essentially a new policy at the U.S. Attorney's

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1 Office that certain guidelines pertaining to relevant conduct  
2 would be included in the plea agreement, and, therefore, the  
3 guidelines calculation. My point is simply that in those  
4 comparison cases, the guidelines would have been identical to  
5 Efrem's if that policy had been in place. They pled guilty  
6 under a different regime.

7 And so, Ms. Daniels pointed to a whole other category  
8 of cases, and the Court found that helpful. I appreciate that.  
9 I'm not prepared to rebut all of them. I know there are  
10 certainly differences in those cases. You know, Ms. Daniels  
11 cited the *Bright* case. That was a case handled by my office.  
12 I believe she noted that was a defendant that went to trial and  
13 testified and was convicted of enticement, and Judge Castel  
14 found, as part of the basis for his sentence, that the  
15 defendant had lied on the stand. There's a host of  
16 differences. I'm not equipped -- I'm unable to respond to  
17 everything, all the new cases Ms. Daniels raised today in  
18 court. I know there are straight cites in possession of child  
19 pornography cases where many Courts in this district, including  
20 in some of my own clients, imposed no jail time as the all. I  
21 could have offered some of those as well.

22 THE COURT: Well, look, the enticement offense here is  
23 at least as serious as the child pornography offense here.

24 MR. MARVINNY: Yes.

25 THE COURT: And I'm not seeing any enticement case

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1 that goes below the sentence you are recommending, and I see  
2 many that go above and materially above.

3 MR. MARVINNY: But the cases we cite in our submission  
4 here involve sentences below five years, and those are  
5 defendants engaging in identical conduct. There's a sentence  
6 of 48 months. There's a sentence of 30, and the average of  
7 those cases is 60 months. That's what I am saying. That is  
8 really the conduct and the posture of those cases; it is,  
9 again, on all fours here.

10 THE COURT: May I ask you, look, as you can tell, the  
11 extent to which the conduct here came close to, from the  
12 defendant's perspective, actual sexual contact; how much does  
13 that track the cases you've cited?

14 MR. MARVINNY: 100 percent. I mean, these  
15 defendants -- I could go one by one -- almost all of them were  
16 arrested at the predetermined meeting location with money,  
17 condoms, or gifts in their hand. It's almost one to one.  
18 There might be one of the seven where the defendant was  
19 arrested before they got to the meeting but not much more than  
20 that. They really -- I'm not going to put my own credibility  
21 at issue, but these are not a cherry-picked selection. These  
22 are really factually -- they are not identical but they are  
23 close. I'm hoping Efrem receives treatment similar to what  
24 those defendants have received, and we think it's important to  
25 consider that. But, again, every case is different.

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1           What I can tell you about Efrem is what I've already  
2       said, which was that they acknowledge the seriousness of the  
3       offense more than anyone. They're ashamed of what they did and  
4       they are ready to get better and to do what they need to do. I  
5       will finish by saying Efrem's family is in attendance. You  
6       acknowledged them at the beginning. Efrem's father in  
7       particular is here. Efrem, when eventually they are released,  
8       wants to go back to Florida live with their father and their  
9       father's partner, care for them, and continue whatever  
10      treatment they've begun at the Bureau of Prisons. I know it's  
11      a serious case, your Honor. I would never say otherwise. We  
12      ask you to impose a sentence that allows that to happen as soon  
13      as is reasonably possible.

14           THE COURT: Thank you, Mr. Marvinny. I should say to  
15      you that I thought your sentencing submission was absolutely  
16      first rate, and I also particularly appreciated Dr. Bardey's  
17      report and Ms. Veasley's. It was a thoughtful and insightful  
18      sentencing submission made all the stronger by the letter from  
19      your client and the letters from those who know him best.

20           MR. MARVINNY: Thank you, your Honor.

21           THE COURT: With that, Mx. Zelony-Mindell, I'd be  
22      delighted to hear from you.

23           THE DEFENDANT: Thank you, your Honor.

24           THE COURT: I see you are going to be reading, which  
25      is normal, just read slowly for the benefit of the court

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1 reporter.

2 THE DEFENDANT: Thank you, your Honor.

3 Judge Engelmayer, I tried to speak to you from my  
4 heart in my letter to you. I just wanted to explain a little  
5 bit more. I'm so sorry for re-victimizing the children, for  
6 the disturbing and appalling pictures and videos I had in my  
7 possession. This reality is made more disturbing when I agreed  
8 to meet with a nine-year-old for sex. This is immoral and  
9 deeply deplorable. Judge Engelmayer, I take full  
10 responsibility for my behavior and for my actions.

11 I can't begin to express how sorry I am. I am  
12 devastated by my behavior, sir. Your Honor, to the extent that  
13 my words mean anything to you, you and no judge will ever see  
14 me in a court again. I will never possess child pornography  
15 and I will never engage in sexual conversations with others  
16 about children, and I certainly will never harm any child.  
17 These things are nightmarish.

18 I want to dedicate myself to my recovery and to  
19 rebuilding my life. I look forward to therapy, including sex  
20 offender treatment, during and after the service of my  
21 sentence. I look forward to spending time with my father,  
22 Charles, and his partner, Julie. I want to be a law-abiding  
23 citizen and stay out of trouble, sir. This experience has  
24 changed me. I recognize the things I was taking for granted  
25 and abusing, and I have a new drive to appreciate my family and

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1 freedom. I'm motivated to be a caring and productive person.  
2 I know I have a lot of work to do on myself. I need to focus  
3 both on who I am and the person I want to be in the future. I  
4 will work every day to be a better person, your Honor. Thank  
5 you for your consideration.

6 THE COURT: All right. Thank you, Mx. Zelony-Mindell.  
7 All right. I'm going to take 20 minutes and assess the just  
8 sentence here. I'll be back in 20 minutes to address the  
9 sentence. Thank you.

10 (Recess)

11 THE COURT: Under the Supreme Court's decision in  
12 *Booker* and the cases that have followed it, the guideline  
13 range, of course, is only one factor that a court must consider  
14 in deciding the appropriate sentence. A court must also  
15 consider the other factors set forth in the sentencing statute  
16 Title 18, United States Code, Section 3553(a). These factors  
17 include the nature and circumstances of the offense and the  
18 history and characteristics of the defendant, the need for the  
19 sentence imposed to reflect the seriousness of the offense, to  
20 promote respect for the law and to provide just punishment.  
21 The need for the sentence imposed to afford adequate deterrence  
22 to criminal conduct, the need for the sentence imposed to  
23 protect the public from further crimes of defendant, and the  
24 need for the sentence imposed to provide the defendant with  
25 needed educational or vocational training, medical care or

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1 other correctional treatment in the most effective manner. The  
2 Court must also avoid unwarranted sentence disparities among  
3 defendants with similar records who have been found guilty of  
4 similar conduct. And as a result, I've attempted to  
5 familiarize myself broadly with the patterns of sentence in  
6 this area to make sure that the sentence imposed here is  
7 broadly consistent with those patterns. The Court is also  
8 required to impose a sentence sufficient, but no greater than  
9 necessary, to comply with the purposes I have just reviewed.  
10 And here I find that the sentence I'm about to pronounce is  
11 sufficient, but not greater than necessary, to satisfy the  
12 purposes of sentencing that I've just reviewed.

13 Mx. Zelony-Mindell, I've given a lot of thought and  
14 attention to the just and appropriate sentence in your case in  
15 light of those Section 3553(a) factors and really the purposes  
16 for which sentences are imposed. These are my thoughts, and  
17 forgive me, this is going to take a few minutes, but this is a  
18 complicated problem. At the outset, I just want to say this:  
19 The 3553(a) factors applied to your conduct and your personal  
20 background are really predominantly what matters here. Those  
21 are really the drivers, but I'm going to say a few words about  
22 the guidelines.

23 I've considered the guidelines recommendation here as  
24 I'm required to. As the defense rightly notes, the Second  
25 Circuit in *Dorvee* has specifically criticized the child



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1 pornography guideline as methodologically flawed. Following  
2 the Circuit's lead, I discount the guideline recommendation  
3 here to the extent it's driven by that guideline for the  
4 reasons stated in *Dorvee*. In the context of this case,  
5 however, that exercise still leaves a very high advisory  
6 guideline range, and that's because the main driver of the  
7 guideline recommendation here in this case is not  
8 Mx. Zelony-Mindell's conduct relating to the distribution of  
9 child pornography but the separate group of conduct relating to  
10 using a computer to induce a minor to engage in prohibited  
11 sexual conduct. That conduct which formed the basis of Count  
12 Three, which had charged the attempted enticement of a minor,  
13 is evaluated under guideline section 2G1.3. And for the most  
14 part, subject to the valid point that Mr. Marvinny raised, that  
15 guideline is really not subject to nearly the same effective  
16 methodological critique as the child pornography's distribution  
17 guideline. It yields a higher offense level in Rule 38 than  
18 the one that the child pornography would. And under the  
19 grouping rules, the child pornography conduct does no more than  
20 add two levels to that level 38 that was generated by the  
21 enticement guideline.

22           The bottom line is: The child pornography conduct  
23 simply adds two, from 38 to 40, to the offense level. After  
24 which, one subtracts three levels for acceptance of  
25 responsibility. Here is the point: If you remove the child

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1 pornography conduct from the equation altogether, the ultimate  
2 advisory guideline range would still be formulated by a net  
3 level 35 and would be 168- to 210-months' imprisonment. The  
4 bottom line is that the guidelines here, even getting rid of a  
5 child pornography conduct, would recommend a long sentence, and  
6 it is morally and normatively impossible, in my judgment, to  
7 fault a guideline for treating that offense, specifically,  
8 enticement of a minor for sex, as warranting a very high  
9 sentence.

10 All right. Turning in any event to the important  
11 things, the 3553(a) factors. The first set of factors requires  
12 me to consider the seriousness of the offense, the need for  
13 just punishment, and the need for the sentence to promote  
14 respect for the law. In other words, the sentence has to fit  
15 the crime, and Mx. Zelony-Mindell, your offense conduct here,  
16 as you know, was terribly serious. One part of it involved  
17 accessing and distributing to others over the internet child  
18 pornography photographs, videos and stills, which were explicit  
19 vile and exploitative. They involved penetration, restraint,  
20 rape, and compelled engagement in sex acts and sexual  
21 stimulation by children, including little children, 4 years  
22 old, 8 years old, 10 years old, 11 years old, 12 years old. I  
23 fully understand that you did not create those materials, and I  
24 fully understand that, unlike in some previous cases, the  
25 victims or the family members have not been identified and have

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1 not submitted victim impact statements. But I've had other  
2 cases of this nature, and I've been told repeatedly from the  
3 perspective of the victims that the distribution and the  
4 redistribution of these materials works, each time, a new  
5 injury on them. Each time a new person, even if now an adult,  
6 has new pornographic photos and videos of them disseminated to  
7 new people, it's experienced as a new offense, as a new act of  
8 exploitation. As Ms. Daniels quite rightly noted, for the  
9 victims, the distribution of these materials makes them relive,  
10 each time, the worst moment in their lives, and, you know,  
11 barring some miracle under which somehow these could be deleted  
12 from internet commerce, that's a price they will pay for the  
13 rest of their lives.

14 You participated in that, Mx. Zelony-Mindell. You not  
15 only accessed and reviewed a vast amount of these materials,  
16 you forwarded some of them to others, each time, again,  
17 visiting harm on the victim and enabling yet a new person to  
18 forward them on to yet new perpetrators. You had to  
19 appreciate, as you've told me you did, that this was wrong and  
20 exploitive. The guideline that applies to this conduct happens  
21 to be badly constructed, but any sensible assessment would have  
22 to view this conduct as terribly serious.

23 And the second part of your offense conduct, in my  
24 assessment, was even more serious. You sent child pornography  
25 stills and videos to a person you understood to be the father

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1 of a nine-year-old boy. You expressed an interest in having  
2 sex with the boy in the presence of his father. In an extended  
3 series of emails spanning months, you were explicit and  
4 enthusiastic about the acts you were going to engage in with  
5 the child. You approved of the idea that the boy would have  
6 sleep medication during the act. It doesn't mitigate things  
7 that you had other noncriminal business to do in New York.  
8 Your actions leave little room for doubt that you intended to  
9 follow through on the plan. You traveled to New York. You met  
10 up with the person you believed to be a father. You brought  
11 lubricant with you, which is a terribly damning fact here,  
12 confirming that your intentions were real. This conduct was  
13 horribly exploitative. It so happened that this was a sting  
14 operation. You didn't know that. You were ready, willing and  
15 able and equipped with supplies for a forcible, sexual  
16 encounter with a partly tranquilized nine-year-old boy that had  
17 the capacity and had every possibility of damaging him,  
18 scarring him for the rest of his life, and potentially setting  
19 him off on a life where he would take the abuse that you  
20 visited on him and visit on a new generation of people.

21 Okay. Switching gears, under 3553(a), I'm also to  
22 consider the interest in what is called general deterrence, and  
23 that refers to the need for the sentence I impose to send a  
24 message to other people that is sufficient to deter them from  
25 engaging in similar crimes. Both of these crimes occur with

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1 disturbing frequency in this district and around the country.  
2 And it's important, for obvious reasons, that cases involving  
3 child pornography and child sexual enticement cases get  
4 prosecuted and that the sentences imposed in those cases be  
5 sufficient in the aggregate to send a message to anybody  
6 thinking about following your lead. The message has to be  
7 don't go there, don't engage in such conduct, or you are  
8 risking a significant prison term.

9 Under Section 3553(a), I have to consider as well a  
10 different type of deterrence called specific deterrence, and  
11 that refers to the need for the sentence I impose in your case  
12 to send a message to you that is sufficient to deter you from  
13 committing future crimes. The report from Dr. Bardey opines  
14 that you present a limited risk of committing a sex offense  
15 against a child. There's is no force to that in that I  
16 recognize that before this case, there's no evidence that you  
17 had ever engaged with a sexual with a child. Although, the  
18 record does indicate a step but ultimately unconsummated in  
19 that direction. And I credit that after proper treatment, it  
20 may well prove that you have eliminated or seriously reduced  
21 that impulse within you, and I credit, too, that you are  
22 commendably eager to get going on that treatment. That's all  
23 good. But this case is a far cry from one in which a  
24 defendant's conduct was limited to just viewing child  
25 pornography, and a wall could be put up between the offense

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1 conduct and the very different offense conduct of contact with  
2 a child.

3 In child porn alone cases, it's more convincing to  
4 contend that the defendant's sexual interest in children was a  
5 voyeur and did not extend to actual sexual activity. Not so  
6 here. Your conduct, your actions went beyond immersing  
7 yourself in child pornography even discussing the possibility  
8 of actual sexual conduct. In this case, you communicated for  
9 months with what you believed to be a nine-year-old's father.  
10 You came to New York with equipment to meet with the child.  
11 All the while, you were describing graphically the sexual  
12 activity you intended to force the child to engage in. And  
13 when you met downtown with the father, from your perspective  
14 minutes or hours away from meeting the child, again, you  
15 brought lubricant with you. Actions speak louder than word.  
16 This case defines the point. I appreciate how deeply and I  
17 have no doubt how sincerely you regret your conduct, but I  
18 can't find today that you pose zero threat or close of trying  
19 to induce a minor to have sex with you. And I can't find that  
20 you pose no threat today, if given the opportunity, of again  
21 re-accessing child pornography. I, therefore, find, at this  
22 moment in time, a continued interest in specific deterrence.  
23 Until you have beaten back, until you have defeated the inner  
24 demons that led you to commit these crimes, and hopefully you  
25 will do that, the threat of a new prosecution has a role to

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1 play in deterring you from straying again.

2 That said, I do find Dr. Bardey persuasive that this  
3 is not a permanent condition. I credit him insofar as he  
4 states that you are capable with the help of professionals of  
5 silencing the demons that led to you this bad place. He  
6 credits you with self-awareness and with making very serious  
7 effort and very real forward progress even within the confines  
8 of the MDC to embrace the struggle and to work through the  
9 issues you have. I was similarly very, very impressed by that  
10 to a degree that is quite unusual in cases of this nature. You  
11 are determined and you are gifted and you are smart and you  
12 appear to be committed to turning your life around. And so  
13 while I'm constrained to find an interest in specific  
14 deterrence today when you are still in the shadow of these  
15 abhorrent offenses, I also find that this is not a permanent  
16 condition. You have the capacity to grow and change and get  
17 better. And so, as central conditions of the supervised  
18 release term that I'll be imposing, I'm going to be requiring  
19 that you get access to the mental health and psychiatric  
20 treatment that you need, and I'll, of course, be recommending  
21 as well the Petersburg prison, which, within the important  
22 limitation that we're talking about, the federal prison system,  
23 is the facility that is most likely to get you the help you  
24 need.

25 Finally, under Section 3553(a), before turning to

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1 factors that point in a different direction, I have to consider  
2 the interest in what is called incapacitation for public  
3 protection. That interest refers to the benefit that the  
4 public gets from your being in a place, prison, where, by  
5 definition, you can't hurt other people whether by accessing  
6 child pornography or potentially making contact with a child.  
7 For the same reason I have covered with specific deterrence,  
8 there is a public interest today, right now, in your being in a  
9 place where you don't have access to children or child porn,  
10 but for the same reasons I just covered, you have it within  
11 your grasp by engaging the therapy to reduce and, I hope,  
12 eliminate the risk that you pose. Now, I'm about to switch  
13 gears.

14 I have considered factors that by their nature tend to  
15 favor a long sentence, and all of them do here, particularly,  
16 the first set relating to the gravity of the offense. But  
17 there are other factors that favor you in the sentencing  
18 equation, and I want to review them with you now. First off,  
19 you accepted responsibility. You did that by pleading guilty.  
20 You did that by admitting your crime. You did it, in fact, by  
21 admitting your crime basically immediately and by consenting to  
22 give law enforcement access to what amounted to incriminating  
23 materials about you. Again, actions speak louder than words.  
24 That is action that goes to your benefit. Were it not for the  
25 guilty plea, please know that the sentence I would be imposing



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1 today would have been higher.

2           The letter you wrote to me, I thought, took ownership  
3 of your crimes to an unusual extent. You dug into, really  
4 admirably, your history and to the struggles you have had. You  
5 tried to explain how you got to the place where these crimes  
6 came about. You apologized to your victims and their families.  
7 Among the other things you wrote, "My trepidation is because I  
8 wish to express to you in a meaningful way how truly sorry I  
9 am. I am sorry for re-victimizing the children in the  
10 disturbing and appalling pictures and videos I had in my  
11 possession. I knew then, as I know now, how wrong I was to  
12 participate in the perpetuation of their trauma. Yet, I  
13 consumed child pornography in earnest. There is no excuse."  
14 You go on in that vein. You've described how the various  
15 unresolved emotional issues you had, how they grew during the  
16 pandemic and set the stage for this offense. You go on to say,  
17 "I want to be clear, I don't mean to blame anyone or anything  
18 but myself for my immoral and reprehensible actions." You  
19 forgive your mother -- I'll get to that in a moment -- which I  
20 thought was above and beyond, and you describe how your  
21 awareness of your character traits and issues is at a far  
22 different level of depth than it has ever been. And you  
23 promised to me that child porn and drugs and so forth will  
24 never be an outlet for you again, and you express the desire to  
25 do the work necessary to get you to a better place.

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1 I often receive letters from defendants apologizing  
2 for their crimes. It's more common than not. Your letter was  
3 really unusual. Its introspection and self-awareness were  
4 simply just on a different magnitude, and I give you a lot of  
5 credit for that. That's a huge early step forward. I  
6 appreciated as well today what I thought was a very sincere  
7 statement to me and, again, a very self-aware one.

8 Second, under Section 3553(a), I'm to consider a  
9 defendant's history and characteristics. From Dr. Bardey's  
10 report and Ms. Veasley's letter and from the thoughtful letters  
11 that I received about you from your family and friends, and,  
12 again, from the characteristically insightful sentencing  
13 submission I received from Mr. Marvinny, I learned about other  
14 sides of you. And I got, I think, a better understanding of  
15 the turmoil that you received in your early life. The people  
16 that know you best believes that the root of your turbulence as  
17 an adult. I'll say that the materials strike a shockingly  
18 harsh and cold and distant mother, who was ungracious and  
19 vindictive to your father and you until abandoning the two of  
20 you completely years ago. I am so sorry. I was horrified to  
21 read that, and I'm so sorry you had to go through that. And  
22 how tragic that a relationship with a mother, which should be a  
23 beautiful thing, became a nightmare for which you are still  
24 today paying a heavy price. Your mother apparently had her  
25 struggles as a child of Holocaust survivors, but nothing

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1 excuses a mother for behaving that way towards a child. Just  
2 as, I think, you recognize, no abuse of by your mother can  
3 excuse your taking advantage of children and paying that bad  
4 thing forward.

5 The letters also describe that notwithstanding that  
6 pain and notwithstanding your retreat to the heavy use of  
7 marijuana and other drugs as an escape, you remained gracious  
8 towards the people who knew you best. And the people who  
9 describe you, also describe very considerable personal gifts,  
10 both personal and creative, on your part. I want to read aloud  
11 a few of the excerpts from the letters I received that struck  
12 me.

13 I want to begin why your father, Charles. He is here.  
14 Thank you for the really thoughtful letter that you wrote. It  
15 really registered with me, and I can only imagine how hard that  
16 was. I also want to applaud you for being in the arena and  
17 being by your son's side for the good and the bad and during  
18 the journey that sounds like it had a lot of horrible parts.  
19 "From the beginning, Efrem has been nothing but remorseful and  
20 has always said that they want to do everything they can to  
21 make amends. What I feel for Efrem is empathy because I know  
22 how much remorse they feel for what they did and how much pain  
23 they're in." Skipping a few paragraphs. "Efrem was a good  
24 kid. From an early age, they had a strong sense of justice and  
25 would befriend everyone from rich kids, poor kids and

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1 especially gravitated towards the needy kids. Efrem stood up  
2 for his peers..." and goes on with examples. "I hope you can  
3 see that Efrem has a good heart despite what they have done."  
4 And he describes, as a result of this situation with your  
5 mother, that part of you, he says, has always been missing, and  
6 he says he loves you dearly. It's a beautiful letter, a  
7 tribute by a father.

8 From your father's partner Juliann; is she here?  
9 Thank you for the beautiful letter that you wrote. She writes,  
10 "Despite all these challenges, Efrem strove continuously to  
11 become an ardent advocate for the marginalized, LGBTQ, women,  
12 people of color. They were a frequent guests on radio and  
13 podcasts where they tried to be a voice for those who couldn't  
14 speak. They worked diligently to get a venue for the artwork  
15 of lesser known artists, especially those of color." Skipping  
16 a paragraph or two. "I've only known them to be sensitive and  
17 gentle, never prone to violence even when angry."

18 From your childhood best friend, Dare Lilly. Is Dare  
19 Lilly here? No. Okay. "We stayed close and told each other  
20 about our family histories and realized that we had similar  
21 experiences. Efrem and I both discussed having difficult  
22 childhoods. We remained extremely close when we went on to  
23 college. Our connection," he says, "has been a constant in my  
24 life. I know in my heart Efrem would never hurt another human  
25 being. I know how incredibly devastated they are to end up in

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1 this situation."

2 From your friend and colleague, Shane Rocheleau; is  
3 Shane here? Okay. "Efrem listens," Shane writes, "when I've  
4 had personal difficulties. They are open, vulnerable and  
5 attentive, and as I've continued my correspondence with them  
6 over the last many months, Efrem has continued to reach out and  
7 be honest about their struggles, very honest, and I'm  
8 heartened. They are very clearly committed to being a better  
9 person, and their continued profound honesty laid bare in these  
10 correspondences."

11 I have read just a small excerpt, but that gives you a  
12 glimpse of what I took away from these letters. These are  
13 really impressive testimonials, Mx. Zelony-Mindell. On a day  
14 that a person is sentenced, it's right that they be evaluated  
15 in the totality of the life's experiences, the good as well as  
16 the bad, the opportunities presented to you as well as the  
17 obstacles. These letters stand in your favor today.

18 In the end, apart from the guidelines calculation, the  
19 government and the probation department recommend a sentence of  
20 120-months' imprisonment, which reflects a significant downward  
21 variance. The defense recommends a sentence of 60-months'  
22 imprisonment, which reflects an even more substantial variance.  
23 I've considered those recommendations. I've given attention in  
24 the aggregate to cases whose offense conduct have a resemblance  
25 of this. Although, no two cases are alike and the personal

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1 journeys and characteristics of the defendant ultimately are  
2 unique, my judgment in the end is this: All parties wisely  
3 recommend a sentence well below the guidelines, and that is  
4 right for various reasons, including that, among others, the  
5 guidelines are out of date being based on patterns of  
6 sentencing decades ago. The guidelines do not give nuanced  
7 attention to the facts, but paint with a very broad brush that  
8 largely treats all people who commit this offense or these  
9 offenses alike. I'm mindful as well that this was a first  
10 offense and an anomalous one in your experience. And I'm  
11 mindful that there are powerful mitigating factors of the sorts  
12 I identified earlier, and I'm mindful as well that I see hope  
13 for improvement and greater psychological health. These  
14 factors do favor, as all agree, a significant downward  
15 variance.

16 I can't, however, with respect, agree to the sentence  
17 of the defense. The horrific nature of the inducement of the  
18 nine-year-old boy to engage in forceable sex, the substantial  
19 steps towards the consummation of that you took, as to the  
20 point of arrest, and the separate, but also grave offense, of  
21 not just consuming but distributing vile child pornography, in  
22 my judgment, together would make a five-year sentence simply  
23 disproportionate to the gravity of the offense and, therefore,  
24 unreasonable.

25 The government's sentence is in contrast reasonable.

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1 That said, my duty is to impose not only a reasonable sentence  
2 but the lowest reasonable sentence that can fairly accommodate  
3 the 3553(a) factors considered together. After considerable  
4 reflection, my conclusion is that a sentence below the one  
5 recommended by the government, not dramatically below but  
6 below, would fairly reflect these factors. I'm going to impose  
7 such a sentence, and I find it to be the lowest one compatible  
8 all-in with the sentencing factors.

9 I want you to know that in assessing the just  
10 sentence, I have considered as well the deplorable conditions  
11 of pretrial custody in which you've been held. As in other  
12 cases, I've credited you for more than one day served for each  
13 day that, in fact, you were in such custody. And your  
14 sentence, therefore, would be lower than it otherwise would  
15 have been on account of those conditions.

16 I'm now going to formally state the sentence I intend  
17 to impose. The attorneys will have a final opportunity to make  
18 legal objections before the sentence is finally imposed.  
19 Mx. Zelony-Mindell, would you please rise. After assessing the  
20 particular facts of this case and the factors under section  
21 3553(a), including the sentencing guidelines, it is the  
22 judgment of the Court that you are to serve a sentence of  
23 90-months' imprisonment in the custody of the Bureau of Prisons  
24 to be followed by a period of five-years' supervised release.

25 MR. MARVINNY: I'm sorry, your Honor. Did you say 90

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1 or 98?

2 THE COURT: Nine zero.

3 MR. MARVINNY: Thank you.

4 THE COURT: As to supervised release, the standard  
5 conditions of supervised release shall apply. In addition, you  
6 shall be subject to the following mandatory conditions: You  
7 shall not commit another federal, state or local crime. You  
8 shall not illegally possess a controlled substance. You shall  
9 not possess a firearm or destructive device. You must  
10 cooperate in the collection of DNA as directed by the probation  
11 officer. You must make restitution, and I'm going to give the  
12 government 90 days to submit a proposed restitution order, but  
13 you will be required to make restitution in connection with the  
14 dictates of that order.

15 I'll request Ms. Daniels kindly to make sure,  
16 materially before the proposed order comes to me, that you have  
17 sent it Mr. Marvinny so that he cannot not only review it but  
18 consult with his client about it. And as soon as you get  
19 information about victims, please relate them Mr. Marvinny so  
20 he is reflecting on these issue in realtime.

21 MS. DANIELS: Yes, your Honor.

22 THE COURT: To continue on, you must apply with the  
23 SORNA, the Sex Offender Registration and Notification Act, as  
24 directed by the probation officer, Bureau of Prisons, or any  
25 state sex offender registration agency in which you reside,



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1 work or are a student or were convicted of a qualifying  
2 offense. Now, there's a number of special conditions, and I'm  
3 going to briefly summarize each of them. Let me ask you,  
4 Mr. Marvinny, these are lengthy to read. Is it correct that  
5 you have reviewed these in detail why your client?

6 MR. MARVINNY: That is, correct, your Honor.

7 THE COURT: All right. So if I summarize them and  
8 then state that I'm incorporating them verbatim by reference,  
9 is that okay? Has your client familiarized himself with all of  
10 the special conditions in the presentence report as written?

11 MR. MARVINNY: Yes, your Honor, including earlier  
12 today so that is absolutely fine to summarize.

13 THE COURT: And, Mx. Zelony-Mindell, is that correct  
14 that you have, in fact, read the special conditions of the  
15 presentence report?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: All right. So just briefly, I'm going to  
18 give you the top-line summary. The first requires you will  
19 undergo a sex offender specific evaluation and participate in  
20 an outpatient sex offender treatment and outpatient mental  
21 health treatment program approved by the probation office. The  
22 second one requires you to submit your person, any property,  
23 residence, vehicle, papers, computer or other electronic  
24 communication, data storage device, cloud storage or media, and  
25 effects to a search by the probation department and, if needed,

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1 with the assistance of other law enforcement. That search is  
2 to be conducted when there's reasonable suspicion to believe  
3 that you are either committing a new crime or violating a  
4 condition of release.

5 Here is why I am doing that. I appreciate that this a  
6 first offense. I appreciated that you accepted responsibility  
7 immediately, but the gravity of this crime is so horrific and  
8 the consequences to the world of your recidivating are so  
9 terrible that I want to put in place every muscular deterrent  
10 possible. If you know that the probation department has  
11 maximum eyes on you, whether through your electronics, your  
12 home, your car, whatnot, if you have any temptation to make a  
13 mistake again, to commit a crime again, I want you to know that  
14 the odds are maximal that you will get caught. And if that  
15 holds any bad impulse in check, that's a good thing.

16 You are to permit the probation department to install  
17 any application or software that allows it to survey and  
18 monitor all activity on your computer and associated devices.  
19 You are restricted from viewing, accessing, possessing and/or  
20 downloading any sexually explicit material involving minors.  
21 You are not to access any websites, chat rooms, internet  
22 messaging or social networking sites where your criminal  
23 history, including this conviction, would render such access in  
24 violation of the terms of service of that website, chat room,  
25 et cetera. You must not have deliberate contact with any child

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1 under age 18 unless approved by the U.S. Probation Office, and  
2 as you'll see, as you know, that condition also extends to  
3 loitering within 100 feet of places regularly frequented by  
4 children. I'm relying on Mr. Marvinny and your representation  
5 that you've read these details, but you need to familiarize  
6 yourself with them. And when you are released on probation, I  
7 know that you will have to sign a form that reflects your  
8 familiarity with this. Just be aware I'm approving every last  
9 bit of the proposed special conditions here.

10 Again, you must participate in a mental health  
11 outpatient program approved by the probation office, and you  
12 must participate in an outpatient treatment program approved by  
13 the probation office, whose program may include testing to  
14 determine whether you have reverted to the use of drugs or  
15 alcohol. I'm not going to impose a fine. I'm persuaded you  
16 don't have the ability to pay it. As I said earlier, I'll  
17 defer restitution until later. The government is not seeking  
18 forfeiture, correct?

19 MS. DANIELS: That's correct.

20 THE COURT: I'm required to impose a mandatory special  
21 assessment of \$100. It shall be due immediately. Although  
22 otherwise two other special assessments would have been due, I  
23 find you to be indigent, and, therefore, unable to pay those  
24 assessments, and I'm not going to impose them.

25 All right. With all of that, does any counsel know of

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1 any legal reason why the sentence should not be imposed as  
2 stated?

3 MS. DANIELS: No, your Honor.

4 MR. MARVINNY: No, your Honor.

5 THE COURT: All right. The sentence as stated is  
6 imposed. There are open counts; does the government now move  
7 to dismiss them?

8 MS. DANIELS: Yes.

9 THE COURT: All right. Granted.

10 Mx. Zelony-Mindell, to the extent you haven't given up  
11 your right to appeal your conviction and your sentence through  
12 your plea of guilty and the plea agreement you entered into  
13 with the government in connection with this plea, you have the  
14 right to appeal those things, your conviction and your  
15 sentence. If you are unable to pay for the cost of an appeal,  
16 you may apply for leave to appeal in forma pauperis. The  
17 notice of appeal must be filed within 14 days of the judgment  
18 of the conviction.

19 From the government, is there anything further?

20 MS. DANIELS: Your Honor, I might have missed it  
21 earlier but whether the Court adopts the presentence report?

22 THE COURT: Oh, I thought I captured that right at the  
23 beginning when I found there were no factual corrections, but,  
24 yes, I certainly intended to do so. If I forgot that, that  
25 would not have been good. I do adopt it.

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1 All right. Mr. Marvinny, anything from you? I know  
2 you want me to recommend Petersburg.

3 MR. MARVINNY: That's it, your Honor. My other  
4 request is for when we're done, absolutely done otherwise,  
5 which is Mx. Zelony-Mindell has asked if he might have a brief  
6 contact visit.

7 THE COURT: Yes, I'll be happy to make that time  
8 available. I acknowledge that the facility that you have  
9 recommended and I'll be recommending, probably inherently picks  
10 up the program that you have in mind, but if there's some  
11 specific recommendation you would like me to make, I'll be  
12 delighted to consider it.

13 MR. MARVINNY: Yes, your Honor. Thank you. That's a  
14 fantastic idea. The Sex Offender Management Program,  
15 specifically, it might be worth endorsing a judgment to that  
16 effect. So FCI Petersburg, and specifically it's called the  
17 SOMP, but the Sex Offender Management Program they offer there.  
18 That would be very helpful, and we'd appreciated it.

19 THE COURT: S-U-M-P?

20 MR. MARVINNY: S-O.

21 THE COURT: Sex Offender Management Program, and the  
22 recommendation is that he be admitted to participate in that  
23 program?

24 MR. MARVINNY: Correct, your Honor.

25 THE COURT: I thought the entire facility is

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1 sex-offender focused?

2 MR. MARVINNY: I don't think that's exactly right.  
3 First of all, there are four different Petersburgs of various  
4 securities.

5 THE COURT: You are looking at Richmond, Virginia,  
6 right?

7 MR. MARVINNY: It's in Hopewell, Virginia. I don't  
8 know if that's near Richmond.

9 THE COURT: The Petersburg facility that I, again,  
10 visited in early judge school was a sex-offender-specific  
11 facility in Petersburg, Virginia. I thought that is what you  
12 were recommending precisely because it's a sex-offender  
13 specific facility.

14 MR. MARVINNY: That is right, your Honor, but there  
15 are -- I think Petersburg has multiple institutions. For  
16 example, there's a high -- like a U.S. penitentiary in  
17 Petersburg as well within the same compound.

18 THE COURT: They are affiliated but in different  
19 states?

20 MR. MARVINNY: No, no. They are the same.

21 THE COURT: What state are you --

22 MR. MARVINNY: Virginia.

23 THE COURT: All right.

24 MR. MARVINNY: I looked it up today. I thought it was  
25 in Hopewell, Virginia, not Richmond.

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1 THE COURT: That is correct. Forgive me, too much  
2 information here. We were in Richmond and traveled to  
3 Petersburg. My bad to say Richmond. It's in Virginia. Okay.  
4 We're on the same page.

5 MR. MARVINNY: Suffice to say, I think a  
6 recommendation that they be designated to FCI Petersburg and  
7 the SOMP program there would be sufficient.

8 THE COURT: Okay. Look, I'm happy to be make that  
9 recommendation. It would be surprising to me if he weren't  
10 admitted to a program of that nature given the nature of  
11 conviction, but it certainly can't hurt for me to recommend it.  
12 I'm happy to do so.

13 MR. MARVINNY: Thank you.

14 THE COURT: All right. I realize I forgot to give the  
15 date by which the restitution order is due. I need to file it  
16 by February 12. So, Ms. Daniels, I'll ask for it a week  
17 beforehand just so I can reflect on it, and if I have to get  
18 input from counsel, I'll have time to do that before the  
19 deadline expires.

20 MS. DANIELS: Yes, your Honor.

21 THE COURT: Anything further from the defense?

22 MR. MARVINNY: No, your Honor.

23 THE COURT: Before we adjourn, I want to say a couple  
24 things. First of all, Mx. Zelony-Mindell, you've heard me say  
25 in very strong terms how bad the offense was. I don't need to

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1 say any more about that, but I do want to say to you how  
2 horrified I was by aspects of your early journey. While  
3 explaining an offense is not excusing it, I got a much, much  
4 better idea of how you came to take the turn that you did. And  
5 I am so, so sorry that you had those experiences, and you have  
6 my empathy. More than that, like I say, the letter you wrote  
7 and the letter your father wrote and the letter your father's  
8 partner wrote and the people who know you best know about you,  
9 make it clear to me that, candidly, unlike some defendants  
10 before me, there's an entirely different narrative here besides  
11 the offense narrative. And you are clearly a creative,  
12 artistic, bright expressive person, and more than that, a  
13 person of great connection and empathy to the people you care  
14 about. You've got a lot to offer this world, and I really want  
15 to wish you the very best. And while it's a horribly loud  
16 wake-up call, and it's too bad it had to be this loud and this  
17 long, when you emerge you'll, trust me, still be a young man  
18 with a lot to offer. I wish you the very best. I'm cheering  
19 for you.

20 THE DEFENDANT: Thank you, your Honor.

21 THE COURT: Beyond that, I want to acknowledge the  
22 family and friends who are here. I can imagine how hard this  
23 is today. Specifically to Charles Mindell, you suffered as  
24 well during the same time your son was, and I was very sorry to  
25 read that. And from the accounts I've been given about you,



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1 you were nothing short of heroic under very, very hard  
2 circumstances. You have my admiration. I pay attention to the  
3 way fathers father, and I have a lot of admiration for you and  
4 for the way, under what must have been an unimaginable time  
5 over the last 12-plus months, you have been by your son's side.  
6 Anyway, I have a lot of admiration for you. I wish you the  
7 very best.

8 I want to thank all the others who participated here  
9 today. The fact that you are here today, the fact that so many  
10 people wrote those impressive letters, tells me that you are  
11 here for the long-term. And one of the next most important  
12 dates for Mx. Zelony-Mindell is going to be when he is released  
13 from prison and rejoins the community. The fact that everyone  
14 is here today, came up to New York for this, tells me that  
15 you're going to be, you know, with him for the long-term, and  
16 he needs that, and that's very encouraging to me. In any  
17 event, I wish all of you well. We stand adjourned.

18 (Adjourned)

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